Office - Supreme Court, U.S.
FILED
NOV 3 1956
JOHN T. FEY, Clerk

No. 548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

BUFFALO FAULTLESS PANTS COMPANY, INC., *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHARLES M. TRAMMELL
BERT B. RAND
HANS A. NATHAN
Counsel for Petitioner
729-15th Street, N. W.
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	12
Appendix A—Statutes	1a
Appendix B—Opinion	2a
Appendix C—Order Extending Time to File Petition for Writ of Certiorari	7a

CITATIONS

Cases:

Fogarty v. *United States*, 340 U.S. 8, 71 S.Ct. 5 (1950)	10
Howard Industries, Inc. v. *United States*, 126 Ct. Cl. 283, 293; 115 F. Supp. 481, 488 (1953)	6
Patterson v. *Lamb*, 329 U.S. 539, 67 S.Ct. 448 (1947)	8
Schmidt v. *United States*, 179 F. 2nd 724, 726 (CA 10, 1950)	8
Schutz v. *Pennsylvania Railroad Company*, 350 U.S. 523, 525; 76 S.Ct. 608, 610 (1956)	5
Urie v. *Thompson*, 337 U.S. 163, 174; 69 S.Ct. 1018, 1027 (1949)	6

Statutes:

Lucas Act, 60 Stat. 902, as amended, 62 Stat. 869, 992, 41 U.S.C. 106 note (Supp. II, 1946 Ed.)	2

Miscellaneous:

Department of the Army, War Contract Hardship Claims Board: Claim of Hanover Woolen Mills Company, under Public Law 656; HCB No. 45 (1949)	8
War Contract Hardship Claims, Sub-Committee, Judiciary Committee of the Senate on S. 1477, 79th Congress, 2d Sess. April 12 and 13, 1946	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

BUFFALO FAULTLESS PANTS COMPANY, INC., *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on June 5, 1956.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Claims, printed in Appendix B hereto, *infra,* p. 2a, and appearing in the Record at pp. 35-39, is reported in 142 F. Supp. 594.

JURISDICTION

The judgment of the United States Court of Claims was entered on June 5, 1956 (R. 35). An order extending time to file petition for writ of certiorari to and including November 3rd, 1956, was granted on September 4th, 1956 (*infra,* Appendix C, p. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255.

QUESTION PRESENTED

Whether a Federal Trial Court may apply a standard of "negligence" other than the standard formulated by and applied in Federal decisional law, in imputing "fault or negligence" to a claimant under a federal statute.

STATUTES INVOLVED

The statutory provisions involved are the relevant sections of the Lucas Act, 60 Stat. 902, as amended, 62 Stat. 869, 992, 41 U.S.C. 106 note (Supp. II, 1946 Ed.) They are printed in Appendix A, *infra,* p. 1a.

STATEMENT

A petition was filed against the United States by the petitioner under the Lucas Act to recover a net loss attributable to contracts with the Government during World War II. It was stipulated by the parties that the net loss attributable to the two contracts involved in the litigation was $91,086.36 (R. 40).

The petitioner a successful manufacturer of men's pants since 1919, had satisfactorily performed five contracts for Army wool serge trousers prior to entering into the two contracts under which the stipulated net loss was sustained (R. 40). These two contracts in

suit were for British Army cotton shorts under Lend-Lease which had never previously been made in the United States (R. 50). The United States War Department solicited these two contracts from the petitioner and the petitioner made its offer subject to receiving preference rating certificates "to enable it to purchase certain specific items of machinery". (Exhibits 1 and 2; R. 41).

A total of twenty-nine similar contracts were awarded at comparable prices under circumstances outlined in a War Department Memorandum dated June 24, 1943 which is set forth by the Court below as its Findings of Fact Nos. 15 and 35, reading, in part, as follows:

> "1. As a result of subject directive a total of 29 contracts were awarded in the procurement of 2,180,000 Trousers, Cotton, Khaki, Knee Length, War Aid.
>
> 2. Out of the 29 contracts awarded under subject directive, a total of 21 are delinquent as of this date. This delinquency is due to:
>
> a. At the time awards were made, this Depot was procuring large quantities of Jackets, Herringbone Twill, Special; Shirts, Cotton, Khaki, Special; and Suits, One-Piece, Herringbone Twill, Special, therefore awards were made with many firms which would not normally have been given contracts because they lacked sufficient equipment and experience on this type of item.
>
> b. This item is one which has never been previously made by any contractor. Several specification requirements have made this item particularly difficult to manufacture on a mass production basis.
>
> c. Labor shortages have played havoc with the normal flow of production in almost every

instance. It was necessary to place five contracts in Buffalo, N. Y.—one of the nation's most serious labor shortage areas.

d. Being a new item, many bidders figured their manufacturing costs too low."

After hearings before a Commissioner for the Court below, the Commissioner made a report, including as his Finding of Fact No. 40 a finding to the effect that the stipulated loss "was due *in part* to the fault of the plaintiff" (R. 34). (Emphasis supplied). In his other Findings the Commissioner made it clear that Finding of Fact No. 40 was premised upon a "lack of adequate supervision". (R. 28). Coupled with this Finding of Fact No. 40 was Finding of Fact No. 16 stating that the place of manufacture of petitioner was an area of serious labor shortage and Finding of Fact No. 30 (third paragraph) to the effect that the plant superintendent "was entirely competent", but did not have adequate assistance. (R. 24, 28). The Court below made Findings of Fact identical with those referred to heretofore, except that the Court's Finding of Fact No. 40 was revised to read that the stipulated losses "were at least in substantial part due to the fault of the plaintiff", as compared to the Finding of the Commissioner that the stipulated loss "was due in part to the fault of the plaintiff". (R. 34, 52).

The Court below dismissed the petition of the plaintiff, the petitioner herein, upon the grounds that the petitioner undertook to deliver under contracts requiring expansion of production, machinery, and labor, and since the stipulated loss was largely attributable to petitioner's deficiencies in coping with the managerial problems which such an expansion raised,

petitioner's loss had to be imputed to its negligence and petitioner's recovery was barred. The Court below stated that in making its decision upon these grounds it recognized that *"Perhaps anyone was bound to fail in these circumstances"*. (Emphasis supplied) (R. 39). The Court below however did *not* in its Opinion *or* Findings of Fact impute negligence to the petitioner on the grounds that the facts or circumstances which caused the stipulated loss were due to any acts or omissions by the petitioner in the performance of the two contracts, of which a reasonable, prudent contractor under similar circumstances would *not* have been guilty. (R. 35-53).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case is in direct conflict with the Federal decisional law as promulgated by the Federal District and Circuit Courts and by this Honorable Court.

There are very few so well settled and fundamental legal concepts as that of negligence. Despite the converse proposition that there is probably no issue so difficult to determine as that involving the application of the legal concept of negligence to a particular set of facts, the concept seems universally as stated by this Honorable Court in the case of *Schutz* v. *Pennsylvania Railroad Company*, 350 U.S. 523, 525; 76 S. Ct. 608, 610 (1956), to wit:

> "Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances".

The foregoing definition is an unchallenged distillation of the Federal decisional law on this subject. As such, in this case the Court below was obligated to apply it in connection with the Federal statute involved.

As this Honorable Court pronounced in the case of *Urie* v. *Thompson,* 337 U.S. 163, 174; 69 S. Ct. 1018, 1027 (1949), involving another Federal statute:

> "Federal decisional law formulating and applying the concept [of negligence] governs".

The decision of the Court below bars recovery on the ground of imputed "fault or negligence". In its own decisions under the Lucas Act the Court of Claims has recognized that "fault or negligence" means nothing more than "negligence" as the word is usually employed. In the case of *Howard Industries, Inc.* v. *United States,* 126 Ct. Cl. 283, 293; 115 F. Supp. 481, 488 (1953), the lower Court referred to ". . . the statutory requirement that only those plaintiffs may recover whose losses were not due to their negligence . . ."

In the instant case the decision of the Court below does not define the concept of negligence which it applies. The Court says in its Opinion that "perhaps, *anyone* was bound to fail in these circumstances". This statement taken in conjunction with the rest of the Opinion clearly demonstrates the application of a legal concept of negligence which involves not the standard of the *reasonable* man but that of a *perfect* man—in other words, any mistake or error regardless of circumstances is negligence. This concept is especially abhorrent in the instant case where

a statute which was designed to give relief and equity was involved.

2. The decision of the Court below in the instant case is of importance in the administration of all Federal laws providing for relief of claimants, and the entire body of Federal law wherein the concept of negligence may require interpretation and application.

The legal concept of negligence is important to the administration of a substantial proportion of the Federal laws. As pointed out above, the Federal decisional law, which must be applied, yields a uniform legal concept approved by this Honorable Court. It is incumbent upon the Court of Claims to apply this legal concept wherever the Congress makes the concept of negligence important in its legislation. Not only should the Federal decisional law be applied, but it should be applied forthrightly. If this is not done there may well be a subtle erosion of the legal principle involved. If the Court below has not directly invoked a new concept of negligence in the instant case, it certainly has failed to apply clear-cut legal principles. The Court below, in its Opinion, recites at considerable length some of the difficulties encountered by the petitioner in the performance of two contracts, as a result of which a loss was suffered. Then it proceeds to say that despite the fact that "perhaps anyone was bound to fail in these circumstances", the pre-existing *difficulties* themselves, not anything petitioners did or failed to do (difficulties which both parties knew existed and were beyond the petitioners' or anybody else's power to overcome) permit the Court to impute "negligence" to the *petitioner*. As was said by the Court of Appeals for the Tenth Circuit in

Schmidt v. *United States*, 179 F. 2d 724, 726 (1950), (quoting in part Mr. Justice Cardozo),

> "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.
>
> "This is just another way of saying that the invasion of one's right must be the direct, proximate, or efficient cause of the injury."

The Court below not only applied a new concept of negligence but in fact violated the basic principle of law that something that petitioner did or failed to do had to be "the direct, proximate, or efficient cause" of the loss before the Court could find petitioner was barred from recovery. It is submitted that there is no Federal decisional law which supports such a concept. *It is significant that the Court below provides no citation to support its unique position.*

It has been found by this Honorable Court that an issue of this kind may assume importance because the lower Court's decision is at war with a well-established construction given a statute by the administrative agents charged with its enforcement. *Patterson* v. *Lamb*, 329 U.S. 539, 67 S. Ct. 448 (1947). The concept of negligence established by the common law and adopted by the Federal decisional law is so uniform that the administrative agents charged with the enforcement of statutes in which the concept of negligence is a factor, apparently apply that concept without deviation. For example: in an administrative determination under the very statute involved herein, the War Contract Hardship Claims Board of the Department of the Army in the *Claim of Hanover Woolen*

Mills Company, under Public Law 657, HCB No. 45 (1949), was confronted with a situation in which the Board determined at p. 12 that:

> ". . . On the question of possible negligence, the evidence presented before the Board discloses that claimant sustained the major part of its loss because it undertook to produce 32-ounce cloth at a unit price determined by mills equipped to produce such cloth when its own equipment, which was admittedly not of the best, was capable of producing efficiently only 20-ounce cloth or cloth of a lesser weight. There is nothing in the record to show that within the limitations imposed by its lack of modern equipment claimant's mill was not efficiently operated or that inefficient manufacturing methods were employed in producing the cloth required by its contract. Hence, claimant could have avoided its loss only by refusing to accept the contract at the agreed unit price."

The Board then proceeded to apply the concept of negligence required by the Federal decisional law and found at pp. 12 and 13 as follows:

> "In the opinion of the Board, claimant's acceptance of this contract with knowledge that at the agreed unit price it would probably sustain a loss does not of itself constitute fault or negligence on its part. This Board has previously held that to impute 'fault or negligence' to a contractor within the meaning of the Act and the executive order it must be found that the facts or circumstances which caused the loss were due to acts or failures of contractor in the performance of a contract, of which a reasonable prudent contractor under similar circumstances would not have been guilty. Hence, this Board finds that subject claim is equitable under all the circumstances and that the loss was incurred without fault or negligence on the part of the claimant".

In the foregoing administrative action, it is clear that in an almost identical situation the administrative agents charged with the enforcement of this statute employ the well-established construction of the concept of negligence applied when the concept of negligence is made an important factor in a statute by the Congress. A comparison of the statement of facts as found by the Board with the Findings of Fact Nos. 15 and 35 in the instant case as found by the Court below, shows an unusual identify of factual situations. In the instant case there was also a comparable price applied to all twenty-nine contracts for identical work awarded through the United States, regardless of extraneous factors as availability of equipment, supervision and labor.

The concept of "negligence" requires such frequent interpretation under Federal statutes that any deviation from the Federal decisional law may well be a serious hindrance to effective administration of laws involving the concept of negligence because of the confusion which might be created on the administrative level.

3. The decision of the Court below in the instant case is unjust, unreasonable and plainly wrong. Since the Court of Claims is the sole forum in which many claims made under applicable statutes similar to the Lucas Act can be brought, and since it is reasonable to believe that the issue is one of continuing importance under successive acts in which the concept of negligence is a factor, the issue arising in this litgation has a unique importance warranting review.

The legislative history of the Lucas Act is recited in *Fogarty* v. *United States*, 340 U.S. 8, 71 S. Ct. 5

(1950). It is clear that this Act was passed to grant generous relief and it was the intention of Congress that the Act be liberally construed.

The "fault and negligence" standard was inserted only upon protestation from the General Accounting Office, that unless *some* standards were written into the Act, ". . . the relief . . . necessary to prevent a manifest injustice, is so broad and susceptible of so many different interpretations, varying all the way from law through equity down to natural justice . . ." (*War Contract Hardship Claims,* Sub-Committee, Judiciary Committee of the Senate on S. 1477. 79th Cong. 2d Sess. April 12 and 13, 1946).

Under such circumstances, the decision of the lower Court in the instant case, which to all practical purposes makes the petitioner the "insurer" of its performance, is not only contrary to the Federal decisional law, but effectively disregards the express intent of the Legislature.

This petitioner has no other recourse than to this Honorable Court. This petitioner is clearly entitled to relief if upon application of the uniform legal principles applicable, the petitioner can sustain its case. Instead, it is submitted, the Court below has deprived this petitioner of this opportunity by either applying an incorrect standard of negligence, or by making an "ad hoc" decision without any application *at all,* of the legal principle involved.

Since the concept of negligence is a legal concept, which is so frequently employed under the Federal laws, the importance of a review of this decision, not only to this litigant but to future litigants under other Federal laws, seems apparent.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. TRAMMELL
BERT B. RAND
HANS A. NATHAN
Counsel for Petitioner
729-15th Street, N. W.
Washington, D. C.

November 3, 1956.